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CHARLES ELMORE

IN THE

# Supreme Court of the United States

October Term, 1936.

GREAT LAKES TRANSIT CORPORATION,
*Petitioner,*

against

INTERSTATE STEAMSHIP COMPANY and ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*, Intervening Underwriters,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

BROWN, ELY & RICHARDS,
*Proctors for Petitioner.*

LAURENCE E. COFFEY,
*Of Counsel.*

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1936.

GREAT LAKES TRANSIT CORPORATION,
*Petitioner,*

vs.

INTERSTATE STEAMSHIP COMPANY
and
ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*, Intervening Underwriters,
*Respondents.*

## PETITION.

Your petitioner, Great Lakes Transit Corporation, prays for a writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, to review its order and decree filed June 5, 1936 (347), affirming the decree of the United States District Court for the Northern District of Ohio, Eastern Division, and to review the order of the Circuit Court of Appeals denying petitioner's motion for reargument (373). The opinion of the Circuit Court of Appeals (348) is reported at 86 Fed. (2) 740 (Adv. Sheets No. 8, Feb. 1, 1937), and the opinions at the District Court, three in number (242, 315, 317) are not officially reported.

### The Nature of the Case.

On August 11, 1933 there was a collision in the St. Clair River, opposite the City of Port Huron, between

petitioner's Steamer GEORGE D. DIXON and the Interlake Steamship Company's Steamer WILLIS L. KING. Each vessel owner brought suit in admiralty against the other. John Milko, a seaman injured in the collision, intervened and the suits were consolidated (56). After the decision on the question of fault the Atlantic Mutual Insurance Company and other underwriters intervened, claiming the right to collect full cargo damage and loss from the Interstate Steamship Company, the non-carrying vessel. The Interstate Steamship Company, under the 56th Rule in Admiralty, impleaded the Transit Corporation, which answered the intervening petition (40). No testimony was taken on the issues raised by the intervening petition, and the answers thereto, all facts bearing thereupon being stipulated (262-305).

The interlocutory decree adjudged each vessel in fault for the collision and that the intervening underwriters could recover a moiety of the cargo damage from the WILLIS L. KING and her owner, and a moiety from the GEORGE D. DIXON and her owner (319-324).

The two following unrelated questions are presented:

First: Under the findings of fact made by the District Court, affirmed by the Circuit Court of Appeals, is the conclusion of the Circuit Court of Appeals that the Dixon was at fault correct?

Second: Are the intervening underwriters entitled to recover a moiety of cargo damage from the Great Lakes Transit Corporation, their named assured?

## FIRST QUESTION.

Petitioner contends that the conclusion from the facts found, which of course is a conclusion of law (C. W. PATTERSON, (C.C.A. 2), 70 Fed. (2d) 712), that the Dixon was at fault, is erroneous. Following is a brief summary of the findings of fact which are fully set forth in the opinions of the Courts below.

Although the storm amounting almost to a cloudburst did not prevent the masters of the respective vessels from seeing the banks of the river, it was such as to make it impossible for them to see each other until just prior to the collision. When the King heard a fog signal from the Dixon she merely checked to half speed, did not reduce to bare steerageway, and therefore violated Rule 15 of the White Law (33 U.S.C.A. Secs. 241-293), prescribing Navigation Rules for the Great Lakes. Although the King blew three one-blast signals to each of which the Dixon responded, the King did not direct her course to starboard in conformance thereto, and therefore violated Rule 23 requiring that *in all weathers* a vessel blowing a one blast signal shall when necessary, accompany it by a corresponding alteration of her helm. The Dixon blew fog signals as required by Rule 14 and checked to bare steerageway as required by Rule 15, answered and conformed to the King's first one-blast signal in conformance to Rule 23 of the Navigation Rules of the Great Lakes. Rule 23 is as follows:

> "*In all weathers* every steam vessel under way in taking any course authorized or required by these rules shall indicate that course by the following signals on her whistle, to be accompanied whenever required by corresponding alteration of

> her helm; and every steam vessel receiving a signal from another shall promptly respond with the same signal, or, as provided in Rule Twenty-six: 'One blast to mean "I am directing my course to starboard." • • •'"

The District Court concluded that instead of answering the King's second blast signal with a like signal, the Dixon should have blown an alarm and stopped her way. The Circuit Court of Appeals concludes that the Dixon's only fault was in failing to blow an alarm in conformance with Pilot Rule II and Navigation Rule 26 (33 U.S.C.A., Sec. 291). Rule 26 is as follows:

> "If the pilot of a steam vessel to which a passing signal is sounded deems it unsafe to accept and assent to said signal, he shall not sound a cross signal; but in that case, and in every case where the pilot of one steamer fails to understand the course or intention of an approaching steamer, whether from signals being given or answered erroneously, or from other causes the pilot of such steamer so receiving the first passing signal, or the pilot so in doubt, shall sound several short and rapid blasts of the whistle; and if the vessels shall have approached within half a mile of each other both shall reduce their speed to bare steerageway, and, if necessary, stop and reverse."

Pilot Rule II is Supervising Inspectors Interpretation of Rule 26 and is in effect the same.

Taking up *seriatim* the clauses of Rule 26, we find that the Dixon did not blow a cross signal, nor did she fail to understand the course or intention of the King from signals being given or answered erroneously. She therefore did not violate these two clauses of the rule. We also find that Captain Goodberry was not in doubt from other causes as to the course and intention of the

King, for he answered each of her one-blast signals and ported his helm in conformance to his answer. The judicial decision here made is therefore not that there was any act done or omitted in direct infraction of any rule or statutory mandate, but that Captain Goodberry should have been in doubt as to the course and intentions of the King, because the King was still slightly (one-half point) to starboard of him when the second one-blast signal was sounded.

This rule has ordinarily to do with cases in which there is a failure to come to a passing agreement.

In THE GEORGE W. ROBY, a fog collision case (C.C.A. 6), 111 Fed. 601 at 609, the Court interpreted Rule 26 as follows:

> "Rule 26 is intended to apply to the ordinary circumstances of a *failure to come to an agreement as to passing before* coming within a half mile of each other. In such case the duty to reduce speed, and to stop and reverse, if necessary, is imposed, *regardless of fog* conditions, when the vessels come within the distance named by the statute". (Italics ours.)

In HAWGOOD TRANSIT CO., vs. MESABA SS. CO., (C.C.A.6) 166 Fed. 697, a fog collision case, there was no passing agreement. The Etruria was condemned for not stopping and blowing an alarm when she did not receive a reply to her passing signal, and the Stone was held in fault for failing to reply.

In PITTSBURGH SS. CO., vs. DULUTH SS. CO., (C.C.A.6), 222 Fed. 834, a fog collision case, there likewise was no passing agreement. The Empire City was

condemned for *failing* to respond to a one-blast signal, and the sonoma was condemned for not stopping and blowing an alarm when she did not *receive* a reply.

In THE NORTH STAR, 62 Fed. 71 (C.C.A.6), decided before the White Law was effective, both vessels were condemned for excessive speed. Neither vessel blew an alarm nor was there any suggestion that either had the obligation so to do.

In THE SAN SIMEON (C.C.A.2), 63 Fed. (2d) 798, not a fog case, the vessel was held in fault for not answering an *initial* two-blast signal with an alarm. The court stated that the failure to blow an alarm was not a fault within the letter of the rule, nevertheless it was within the spirit of the rule since the proposed navigation was "plainly impracticable" (801).

Giving full effect to the above five cases, which are the only ones cited by the Circuit Court of Appeals as authorities for holding the Dixon at fault, it will be found that condemnation has only been had under Rule 26 in cases in which there were no passing agreements before the vessels were within half a mile of each other, or a clear showing that a navigator was in fact or should be in doubt for the reason that the *proposed passing agreement was plainly impracticable.*

The Circuit Court of Appeals for the Sixth Circuit has judicially construed a one-blast signal to mean:

> "I am in control of the movements of my own vessel and of my consort, and am directing my course and that of my tow to the starboard, so that you may safely pass me on my port side, as you propose, provided you direct your course to star-

board far enough to leave me at a safe distance on your port side." (The F. W. Wheeler, 78 Fed. 824, at page 829.)

There were no cross signals, no confusion, nothing but an affirmation of the King's first one-blast signal, "I am directing my course to starboard." By this signal Captain Watts told Captain Goodberry as fully and as effectively as if he had been directly connected by telephone and had told him by the spoken word, that although somewhat delayed the King was then directing her course to starboard, that there would be safety for both vessels if the Dixon did likewise. It would seem that the conclusion that Captain Goodberry should have been in doubt, should be based upon a clear showing that the King did in fact port her helm but nevertheless the collision did occur, in other words that from the then situation of the vessels the agreed passing had become "plainly impracticable", and a new passing arrangement with all its attendant confusion and danger was necessary.

The answer to interrogatories (13) and the testimony of Captain Watts (78) are to the effect that the last helm action of the King before the Dixon appeared was to direct her course to port and not to starboard. There is no suggestion in any opinion that at the time of the second one-blast signal there would have been the slightest difficulty in conforming to the one-blast agreement then and theretofore made, had the King directed her course to starboard as she had twice indicated she would. Indeed, since at that time the vessels were almost half a mile apart it can be demonstrated to a certainty that had the King ported her helm as little as half a point, there would not have been

the slightest risk of collision. The decision, therefore, that the fact that the King was slightly on the starboard bow of the Dixon at the time of the second blast passing agreement, should have raised doubt in Captain Goodberry's mind as to the course and intention of the King, is a decision directly *contra* to the long established rule in the admiralty that the master of one vessel has the right to assume that a vessel he is meeting will comply with the rules and conform to her passing agreement.

THE VICTORY AND THE PLYMOTHIAN, 168 U. S. 410, 426.
SERVIA, 149 U. S. 144, 153.
LAKE ERIE TRANSP. CO. v. GILCHRIST TRANSP. CO., 142 Fed. 89 (CCA 6).
GREAT LAKES SS. CO. v. PITTSBURGH SS CO., 222 Fed. 862 (CCA 6).
THE BURLINGTON, 63 Fed. (2d) 781 (CCA. 2).
MARSDEN ON COLLISIONS AT SEA (8th Ed) 376.
THE DELAWARE, 161 U. S. 459.

In THE VICTORY AND THE PLYMOTHIAN, 168 U. S. 410, it was seen from the deck of the Plymothian for an appreciable time before collision that the Victory was not conforming to the rule to "keep to the right" nor did she answer the one-blast signal of the Plymothian. It was contended that the Plymothian should have appreciated the danger and had she done so collision would have been averted. The Supreme Court says:

> "Each of these vessels was entitled to presume that the other would act lawfully; would keep to her own side; if temporarily crowded out of her

course, would return to it as soon as possible; and that she would pursue the customary track of vessels in the channel, regulating her action so as to avoid danger." (426.)

The second one-blast signal, although heard slightly off the starboard bow of the Dixon and to the eastward of mid-channel, instead of creating a doubt in the mind of Captain Goodberry was assurance that the oncoming vessel, although delayed in carrying out the message of her first one-blast signal, would still perform her duty and direct her course to starboard, and that the vessels could pass in safety if the Dixon did likewise.

In THE DELAWARE, *supra*, this court said:

"If the master of the preferred steamer were at liberty to speculate upon the possibility, or even of the probability, of the approaching steamer failing to do her duty and keep out of his way, the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both, which would bring about more collisions than it would prevent. Belden vs. Chase, 150 U. S. 674; The Highgate, 62 L. T. R. 841; S. C. 6 Asp. Mar. Law Cases, 512. • • •

"Until the last moment the tug had a right to assume that she would comply with the rule." 469.

The question of fault of the Dixon must be resolved from the viewpoint of Captain Goodberry on the bridge, not from the event. Captain Goodberry says he could see the Canadian bank of the river at all times,

and Captain Watts of the King (137) says he could see both banks of the river. With the banks as a guide, from Captain Goodberry's viewpoint there was not the slightest difficulty of the King conforming to her passing signal and he had a right to presume that she would. From his viewpoint the blowing of an alarm after passing agreement made and affirmed, which could have been carried out without the slightest difficulty had each vessel conformed to her signal, was unthinkable. It would have led to great and needless confusion since a new agreement would have to be made; and if the mandate of the rule was carried out each vessel would have had to stop and reverse and would be out of control. At the time of the second one-blast exchange the Dixon was proceeding at slow speed, swinging to starboard on a port wheel and breasting a two mile current. All single screw propellers back to port (84, 125), that is, their sterns cut to port and their bows go to starboard. In KNIGHT, MODERN SEAMANSHIP, 9th Ed. 366, the author has this to say:

> "A vessel drifting in a current and making no way through the water will usually fall athwart and end by drifting broadside on. This may be a serious danger."
>
> "A similar but still more pronounced tendency to fall athwart exists where a vessel which is making no way through the water is subjected to a breeze. A vessel so placed will almost always fall off and bring the wind abaft the beam."

Although the King claims to have been backing two minutes before collision and was backing at collision and her way was greatly retarded by the impact of her stem against the side of the Dixon, it was necessary for her to *back six minutes after collision*, in order

as Captain Watts puts it, to "keep in the vicinity of the Dixon" (64). It was of course impossible that she would have been able to stop in the brief three or four minutes which would have elapsed between the Dixon's proposed alarm and the meeting. If the Dixon did stop her way and the King conformed to her one blast signal as Captain Goodberry was obligated to assume that she would, from his viewpoint there would be grave danger of a collision arising out of the confusion of a broken agreement.

The suggestion (353) in the opinion of the Circuit Court of Appeals that because the Dixon was porting master of the Dixon might have apprehended from the position of the King's light that even though it was then on the port side, the King was not in position to pass safely, likewise does violence to the rule that navigation of the meeting vessels must be based upon the assumption that each is conforming to her passing agreement. The single flash in the storm of the cluster of electric lights upon the spar of the King, seen by the lookout off the port bow of the Dixon, was no indication of the direction in which the King was headed. In view of the fact, however, that this was the third time that the King had stated she was directing her course to starboard, from Captain Goodberry's viewpoint she had done so and it was full assurance that the vessels were passing well clear, since apprehension that she was not passing clear could only flow from the assumption that the messages of the three one-blast signals were false. It is submitted that this would have had to have been the working of Captain Goodberry's mind if the conclusion that the Dixon was at fault because she did not blow an alarm, is correct. "I appre-

ciate that the King has not and will not port although she has said and is saying that she has and will. I appreciate that although I do not see her and do not know that she is proceeding at a high and unlawful rate of speed, she must be doing so. Therefore I will stop and blow an alarm and allow my own vessel, out of control, to drift with the current." Surely such reasoning would have done violence to the authorities which hold that a navigator managing his boat in accordance with the rules and good seamanship, has a right to assume others will do likewise, and reverses the rule laid down by the Supreme Court in The VICTORY AND THE PLYMOTHIAN, *supra*, and in THE DELAWARE, *supra*.

*Petitioner also contends that the Dixon performed the full measure of her duty when she reduced her way to such an extent that she could stop within the limits of visibility.*

Irrespective of the direct command of the rules of navigation, and as a definition of cautious navigation and good seamanship, the Supreme Court has laid down the so-called "rule of sight" or "seeing distance". We quote:

> "It has been said by this court, in respect to steamers, that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law." (THE CHATTAHOOCHEE, 173 U. S. 540 at 548.)

The Dixon was complying with the "rule of sight". The King was not. Indeed, the Dixon proceeding at

bare steerageway, headed toward the shore and almost broadside to the current, was actually floating downstream away from the King at the current speed of two miles an hour at time of collision. It is rare indeed to find a fog collision case in which both vessels are traveling in the same direction at collision.

Research discloses no case where one vessel has been condemned for failing to supervise the navigation of another. We have examined every fog collision case on the Lakes, and have as yet to find one wherein it has been held that *after a passing agreement*, arrived at without confusion or dissent, a vessel proceeding as was the Dixon at such speed, as would permit her to comply with the "rule of sight", was condemned for failure to tell the other vessel by alarm that the latter was guilty of "bad navigation".

*The gross fault rule is applicable to the case at bar.*

In THE CITY OF NEW YORK, 147 U. S. 72, at 85, this court said:

> "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

In their brief in the District Court, proctors for the King had this to say with respect to the claim of the Dixon that the King was blowing one-blast signals and did not conform thereto:

> "But one who accuses a master of steam vessels, holding a master's license unlimited from the United States Steamboat Inspection Service, who since 1910 has sailed as master and having property under his control of upward of a million dollars, of such an *inexcusable blunder*" (blowing a one blast signal and navigating as if he had blown two) "should have the burden of establishing the fact by very cogent proof."

The accusation has now been sustained by the District Court and affirmed by the Circuit Court of Appeals. There can be no doubt but that the King at half speed, having a two-mile current under foot and proceeding against her own accepted signal down the wrong side of the river where the upbound boat, not only by the accepted signal, but also under the custom prevailing for vessels to pass to the right in that stretch of water, (75, 120, 127) adequately accounts for the collision.

In THE VICTORY AND THE PLYMOTHIAN, 68 Fed. 395, the Circuit Court of Appeals divided the damages, stating:

> "We cannot find anything in the record which shows any precaution taken by the Plymothian when she saw the Victory disregarding her signal and obstinately pursuing her course." 399.

In the case at bar there was an agreement as to the method of passing. Although Captain Goodberry could not see, according to the courts below he was bound to appreciate that the message of the King's second one-blast signal was false. The Supreme Court, in holding the Plymothian free from fault, after stating that it would unhesitatingly apply the rule laid down in the *City of New York, supra,* and in *The Umbria,* 166 U. S. 404, continues:

> "Whether she may not have been slightly in fault may be a close question. This is often so

> when subsequent knowledge of what might have prevented disaster tends to qualify the inquiry as to the prior duty to avert it. But, after all, the question is, as pointed out by Mr. Justice McLean in Williamson v. Barrett, 13 How. 101, whether it was the duty of the master, in the exercise of due care and caution in the management of his vessel, to give a particular order. And on a careful consideration of the evidence, we think that the Plymothian was not bound to change her course, or to stop and reverse earlier than she did, and these are the only elements of fault imputed to her." (The Victory and Plymothian, 168 U. S. 410, 424.)

Much is made in both opinions below of the fact that the evidence that the King was slightly off the starboard bow of the Dixon at the time of the second two-blast signal, was given by the Lookout of the Dixon. In THE VICTORY AND THE PLYMOTHIAN, *supra*, THE UMBRIA, *supra*, and in THE MUNRIO, 11 Fed. (2d) 900, evidence of claimed bad navigation of the vessels exonerated under the gross fault rule likewise came from the respective crews of the vessels.

The Circuit Court of Appeals states "Had he (Captain Goodberry) observed either rule quoted above, *he might not have averted the collision but a danger signal would have put the King on its guard.*" The Dixon did not violate the mandate of any rule of navigation. Surely the Dixon's fault—believing the message of the second one-blast signal—was a minor fault, if a fault, at all. Under these circumstances, as we read the gross fault rule the King has the burden of proving that not only was the Dixon at fault but also that had she not been in fault the collision would not have occurred. The Circuit Court of Appeals has held that the King has not met this burden.

## SECOND QUESTION.

*The second question which the petitioner desires to have this Court review is as to the correctness of the decree that intervening underwriters recover back from the Transit Corporation the amount they have paid petitioner for cargo damage and expense.*

The package freighters of the Transit Corporation, differing from bulk freighters, on each trip carry many hundreds of consignments of goods under through bills of lading, the transportation usually being initiated or terminated, and in many cases both initiated and terminated, by rail carriers. Under the Harter Act (46 U. S. C. A. 192), a vessel owner is exempted from liability for loss or damage resulting from faults or errors in navigation or management of the vessel, provided due diligence has been used to make the vessel seaworthy. Many years ago it was found to be more convenient and economical for water carriers to waive the saving provisions of the Harter Act, assume full liability for cargo damage, and cover its liability thus assumed by carrier's liability insurance.

Section 9 (e) (284) of the uniform bill of lading approved by the Interstate Commerce Commission, permitted this procedure. It is as follows:

> "If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading."

The freight on the Dixon was moving under eleven tariffs issued by the Transit Corporation and rail carriers on whose lines the transportation initiated. These were not uniform. They were divided by the Circuit Court of Appeals into three classes (355, 356). Sufficient to say that in each of the three classes the Transit Corporation waived the saving provisions of the Harter Act and other defenses and therefore became liable to cargo owners for any cargo damage or expense, however caused or created.

The Transit Corporation in 1933 procured from the Atlantic Mutual Insurance Company and other intervening underwriters, insurance aggregating $1,100,000 (262) at a premium rate of 2.27% (269). Excess insurance was also permitted and procured (278). Since the Transit Corporation had waived the saving provisions of the Harter Act and assumed full liability to cargo owners following its usual practice of many years standing, it procured, if words mean anything, marine insurance against its (carrier's) liability to cargo owner. The policy provisions are set forth in the rider designated "First Interest" (275-279), the last clause of which provides that the rider is

> "to be regarded as substituted for those of the policy to which it is attached, the latter being hereby waived" (279).

By this form of special rider intervening underwriters agreed to and did:

> "Insure, lost or not lost, Great Lakes Transit Corporation for account of whom it may concern. Loss, if any, payable to Great Lakes Transit Corporation or order. At and from April 15, 1933 to midnight (Chicago time) December 12, 1933 • • • on cargo of any kind owned by the Assured and

on the *Assured's liability to others in respect of cargo of any kind covering* same from time said Great Lakes Transit Corporation becomes responsible therefor and until its responsibility ceases • • • and under and/or on deck on board of the Assured's steamers • • • George D. Dixon • • •, the Assured *taking upon themselves* as to said cargo, or parts thereof, all the risks, perils and liabilities which by law a common carrier by land or water assumes, and also the insurance of said cargo against perils of the seas and lakes, fire, jettisons, barratry, negligence of master or mariners, loss or damage arising through explosions howsoever or wheresoever occurring, bursting of boilers, breakage of shafts or through any latent defect in the machinery or hull, and all other acts, perils or misfortunes that have or shall come to the hurt, detriment, damage to or loss of the said cargo and undertake to *indemnify and hold harmless the said Assured* against hurt, detriment, damage to or loss of such cargo from any and all such risks, perils, acts or misfortunes, to the extent which the *Assured* may be held by the owners thereof, *under any liability the Assured shall have assumed as common carriers, insurers, or otherwise, and for any and all claims which said cargo may be called upon to contribute in General Average.* • • • *There shall, however, be deducted from the aggregate of all claims on each eastbound or westbound passage, the sum of $1,000.00.*" (Italics ours.)

The so-called marine insurance clauses, of which the above is a typical example, were adopted after and as the result of the Interstate Commerce Commission's decision in WYMAN, PARTRIDGE & CO. *et al*, vs. BOSTON & MAINE RR. *et al.*, 13 I. C. C. Rep. 258, 15 I. C. C. 577. Following is an excerpt from opinion in 13 I. C. C. Rep. 258:

"Without doubt these carriers might, if they saw fit, as already suggested, contract to indemnify the shipper against loss due to perils of the sea. In

such event the carrier itself would become the insurer and the shipper would require no additional insurance. It would be entirely immaterial to the shipper whether the carrier did or did not protect itself by insurance against possible loss."

The Transit Corporation did desire to insure. Mr. Winter, second Vice-President of the Atlantic Mutual Insurance Company, (intervening underwriter having the largest proportion of the risk) in his book entitled "Marine Insurance, its Principles and Practice", has the following to say with reference to the form of policies here involved.

> "There are also liability forms issued to common carriers under which the insurable interest is *not* cargo, but the liability, either imposed by law *or assumed by contract,* of the carriers for cargo in their custody." (p. 113) (Italics ours.)
>
> "The subject of insurance is not the property itself, but the liability of the carrier, whether this be implied by law or assumed by contract." (130.)

By this form of insurance cargo owners were better protected than they would have been had the Harter Act been not waived and they had procured their own cargo insurance, since they had the obligation of the responsible Transit Corporation which had insured its liability, a lien against the carrying ship, and also, in case of insolvency, in New York State, at least, the right to proceed directly against the Transit Corporation's liability underwriters.

> HINKLE v. GLOBE & RUTGERS FIRE INS. CO., 1935 American Maritime Cases, 1330, not otherwise reported, but Affirmed 246 App. Div. (NY) 737, and 271 N. Y. 585.

After the Dixon's loss, in due course the Transit Corporation paid cargo owners by its own check and for its own account their respective losses, and took receipts

therefor in its own name (267, Sched. E 295), prevented claims to underwriters and were duly reimbursed (267) less the deductible average of $1000. This reimbursement by underwriters was by check to the order of the Transit Corporation individually (266), not as bailee or trustee for cargo.

During the period from 1928-1933 inclusive, the Transit Corporation carried general cargoes pursuant to bills of lading in the form above referred to, and had procured identical insurance from the Atlantic Mutual Insurance Co. and other underwriters. During that period numerous losses occurred as a result of perils of the sea. The same procedure as outlined in the Dixon case had prevailed, and in each instance, after paying such losses, the Transit Corporation was duly reimbursed therefor, less the deductible average, by underwriters (267).

At the time the libel of the Interstate Steamship Company against the Transit Corporation was filed, January 23, 1934, the Transit Corporation had paid cargo claims to cargo owners shipping on the Dixon aggregating $22,338.57, an apportionment had been made by average adjusters (305) and the said amount less the deductible average of $1000 was shortly thereafter paid by intervening underwriters (265-266). Since all cargo claims had not been passed, approved and paid, when suit was started unpaid cargo owners had an action directly against the Steamer WILLLIS L. KING and the Interstate Steamship Company. For this reason the Transit Corporation brought suit as owner of the Steamer and as carrier and/or bailee of cargo, seeking in its own right to recover the amount which it had then paid for cargo damages and as carrier and bailee the amount not at that time paid. This appears

from the libel which contains the allegation that the Transit Corporation in "respect to the aforesaid damage to the Steamer DIXON, loss of earnings and use and expenses and *cargo loss and damage*, and as carrier and/or bailee of the said cargo, sustained damages amounting to $120,000.00" (20). In the stipulation of facts in which the so-called insurance question is presented, it is provided that when further claims in excess of the $22,338.57 referred to above, are received, approved and paid by the Great Lakes Transit Corporation, a further statement or statements will be made and payment will be made in like manner by the underwriters, that is, payment will be made by underwriters to the Transit Corporation (266) for the latter's own account. This has been done.

After the decision on the question of fault Messrs. Stanley & Gidley, who had theretofore been acting with proctors for libellant in suit against the King, filed an intervening petition in behalf of underwriters and alleged that the Atlantic Mutual had paid and would pay the sum of $6041.57 to the Transit Corporation for account cargo and was subrogated to the *rights of cargo owners* in that amount and would be subrogated in the amount of future payments which it would make (256). This of course was incorrect since as clearly appears by the rider provision quoted above, and as stated by Mr. Winter in his book referred to above:

> "The subject of the insurance is not the property itself but the liability of the carrier."

The Atlantic Mutual was and could be subrogated to the rights of its own assured, to wit, the Transit Corporation, and to no one else.

The prayer for relief in the intervening petition was that "The Court will be pleased to decree to your petitioner and against the Interstate Steamship Company and against the Steamer WILLIS L. KING * * * the sum of $6041.57" (257). There is no pleading in which intervening underwriters claimed or asked that the Transit Corporation should *repay* to intervening underwriters the amount the latter had then or would thereafter pay on account of cargo damage. The theory of the intervening underwriters was that although they were liable for, had paid and would pay the Transit Corporation the full amount of its liability for cargo loss and damage, they had a right to recover in full from the King and her owner the amount thus paid; and that they were not concerned with the fact that if such recovery in full was made the King could offset one-half of the amount thus paid in arriving at the collision damage under the doctrine of THE CHATTAHOOCHEE, 173 U. S. 540. They contended they had not insured the Great Lakes Transit Corporation against any loss it might sustain by reason of being obligated to contribute toward cargo damage in arriving at the single liability for which decree is given in the admiralty in case of mutual fault. THE NORTH STAR, 106 U. S. 17. Both the District Court (315-316) and the Circuit Court of Appeals (358) properly held that since all the parties were before the court, the Interstate Steamship Company having impleaded the Transit Corporation into the underwriters' proceeding, and the saving provisions of the Harter Act had been waived by the carrying vessel, each of the vessels were primarily liable for a moiety of the damage, and only in case the innocent party is unable to enforce payment of a full moiety from one of the vessels could the

deficiency be recovered from the other. THE ALABAMA AND THE GAMECOCK, 92 U. S. 695. With this holding, since no mistake of fact or fraud is claimed in pleading, proof or argument, the intervening petition should have been dismissed, since there was nothing whatsoever to support a recovery back of the moneys paid to the Transit Corporation by its own underwriters (either carrier's liability or cargo).

Judge West, in his opinion (315-316) directed that the decree should be for a moiety of cargo damage against each vessel, and that underwriters "are entitled to enforce the liability of the King and that of the Dixon, each for a moiety of the cargo loss." He directed, however, that the decree presented by the proctors for the Dixon should be entered. This he later retracts by a letter (316) and in a supplemental opinion (316-18) he concludes, as petitioner reads the opinion as follows:

1. That the tariffs providing "rates • • • include marine insurance" obligated the Transit Corporation to procure cargo policies, and this was not done.
2. That the policies actually issued cover the legal liability of the Transit Corporation in which coverage cargo owners have no insurable interest.
3. That coverage of the carriers legal liability is sufficiently broad to include the Transit Corporation's liability for failure to provide cargo insurance, and that as to this coverage cargo owners have an insurable interest.
4. That cargo owners were entitled to have the protection of cargo insurance as well as that of carriers common law liability, and the carrier having failed to procure cargo insurance could not by paying the loss out of its own funds, take away from underwriters the right of subrogation which they would have had had there been cargo insurance.

Again referring to Mr. Winter's book (p. 368) it will be found that the ordinary cargo policy usually contains a provision that cargo underwriters are not liable where the goods are in possession of a carrier "who may be liable for such loss or damage by law or *under an insured bill of lading or under a rate of freight that includes insurance*". It will also be found that the cargo policy to which the rider "First Interest" is attached does contain the identical words quoted above from Mr. Winter's book (Rec. 273). If the Transit Corporation had also procured the ordinary form of cargo policy payable not to itself but to cargo owners as their interests might appear, even if such policy did not contain the clause referred to above, nevertheless the ultimate liability would be with intervening underwriters. This for the reason that after paying cargo owners cargo underwriters would be subrogated to cargo owners rights, and since the saving clauses of the Harter Act were waived by the Transit Corporation such subrogated underwriters could recover in full from it. Having thus recovered, the Transit Corporation in turn could recover from its liability underwriters, the Atlantic Mutual and others, under the policy provision whereby underwriters agreed to indemnify the Transit Corporation to the extent to which it may be liable under any liability it "*shall have assumed as common carriers, insurers or otherwise*" (277). See GROSS v. N. Y. & TEXAS STEAMSHIP CO., 107 Fed. 516. Thus it will be seen that the second fund, cargo insurance, referred to by Judge West (318) deprived intervening underwriters of nothing.

The Circuit Court of Appeals states the question presented to be:

> "As to the second question, *i. e.*, whether the *cargo insurance* was payable to the owners of the Dixon as carrier, or as bailee or trustee of the cargo for the owners" (355) (Italics ours).

The only possible question is as to whether the Transit Corporation's carriers liability insurance policy also included a direct coverage on cargo, although the determination of this question was immaterial to the determination of any issue raised by the intervening petition and the answers thereto. The opinion of the Circuit Court of Appeals states that the Transit Corporations liability as a common carrier to cargo owners was absolute, being equivalent to that of an insurer (355), that the policies in suit were procured by the Transit Corporation in compliance with its contract to provide marine insurance, and issued *primarily* for the benefit of cargo owners. Assuming this to be so, surely there is no inconsistency in including cargo insurance—if cargo insurance there was—in the same policy with carriers liability insurance. The court then construes the policies as if they were *solely* (not primarily) for the benefit of cargo owners, and ignores, in effect elides, the broadest, clearest carriers liability coverage that could be drafted. The opening clause of the policy defined the specific nature of the coverage as "on the assured's (Transit Corporation's) liability to others with respect to cargo of any kind". Later it is provided:

> "The said Assurers" (Atlantic Mutual Insurance Co. *et al.*) "agree to indemnify said assured" (Great Lakes Transit Corporation) "to the extent to which the assured" (Transit Corporation) "may be held liable under any liability the assured" (Transit Corporation) "shall have assumed as *common Carriers, insurers, or otherwise.*" (Rec. 277) (Italics ours).

Although the Circuit Court of Appeals quotes the excerpt (357), the only comment it makes is "but this clause does not avail appellant because it did not take upon itself the insurance of cargo or any liability with reference thereto as an insurer" (358). It makes no comment upon the fact that the Transit Corporation had assumed the liability of a *common carrier* "equivalent to that of an insurer" (Opinion 355), and that the Atlantic Mutual in the above excerpt agreed to indemnify the Transit Corporation against its liability as a common carrier. Although immaterial, since indemnity against the Transit Corporation's liability as a "common carrier or otherwise" suffices, petitioner points out that in the WYMAN, PARTRIDGE case, *supra*, speaking of tariff provisions in so-called insured bills of lading, the Commission states that "in such event the carrier itself would become the *insurer* and the shipper would require no additional insurance." The policy is a contract between the Transit Corporation and underwriters. It recites that the *Transit Corporation* is taking upon itself as to said cargo, insurance thereof against the perils of the seas and lakes. Surely even if the Wyman Partridge case is wrong, the contract is not wholly ineffective because the liabilities which the parties had in contemplation and have so characterized in their agreement, is technically only "equivalent to that of an insurer" (355) and not that of an insurer.

Even assuming, which is almost impossible, that the policies are cargo insurance and nothing more, intervening underwriters are not entitled to recover back the moneys paid the Transit Corporation since such recovery would be contrary to the doctrine of WAGER vs. PROVIDENCE INSURANCE CO.,

150 U. S. 99. The opinion makes no mention of this case, which holds that where a cargo policy is payable to a named assured or order (in the case at bar the Transit Corporation) for account of whom it may concern, the underwriter is and cannot be subrogated to the rights of cargo owners since payment, as in the Wager case, to cargo owner by order of the named assured is in effect payment to such named assured, and such a payment *of course cannot be recovered back.* The case at bar, is much stronger as against the subrogation than is the Wager case, since the payments have been made to the named assured.

In conclusion upon this point, petitioner submits the result of the decision of the Circuit Court of Appeals is, to say the least, remarkable. For five years, from 1928 to 1933, inclusive, the Transit Corporation has assumed the liability "quivalent to that of an insurer" (Opinion C. C. A. 355) with respect to all cargo moved by it, and has paid large sums for premiums (in the year 1933 in excess of $25,000) for the $1,100,000 policies, which is but a part of like liability insurance. It has been paid by the Atlantic Mutual Insurance Company and other underwriters and has retained many thousands of dollars to reimburse it for payments made to cargo owners on account of losses which they had sustained. If the decision of the Circuit Court of Appeals be correct, the retention of such payments was wrong since such insurance was valueless—indeed worse than valueless since the Transit Corporation, relying upon its supposed liability insurance waived the saving clauses of the Harter Act which would have protected it from all cargo losses arising out of faults or errors in navigation or in the management of its

vessels. There are but few losses not in this category. but few losses not in this category. If these policies If these policies are nothing but cargo policies in which the Transit Corporation has no interest and is in no wise protected, *underwriters can recover back from the Transit Corporation* not only the payments made in the case at bar, but also all other payments made during the five years preceding 1934 that are not barred by the statute of limitations—surely an unhappy prospect.

What a farce comedy it all is under the decision of the Circuit Court of Appeals. A loss occurs; the Transit Corporation pays cargo owners the full amount of their losses; underwriters reimburse the Transit Corporation for the amount of such payments less $1000 deductible average and take a receipt therefor from the Transit Corporation as such, not as bailee or trustee for the cargo; then the final act: The Transit Corporation solemnly repays the amount received from underwriters, to-wit, the amount they had theretofore paid less $1000.00. Surely there is no reason for the $1000 deduction, which supposedly is the Transit Corporation's contribution to the loss, if as now held the ultimate result is that the Transit Corporation must stand the entire loss without reimbursement by underwriters. If the decree of the Circuit Court of Appeals be correct, this procedure must appertain, not to this case alone—loss arising out of mutual fault for collision—but to every conceivable cargo loss, from a peril of the sea, however caused. The unanswerable question is why the useless formality of underwriters paying at all, and why, having voluntarily paid, can they recover back in any event, especially under a

pleading that does not pray for a recovery back and does not allege fraud or mistake.

REASONS FOR ALLOWANCE OF THE WRIT:

1. Vessels owners on the Great Lakes are entitled to know whether their masters navigating their vessels in strict conformance to the statutory rules of navigation, have a right to proceed upon the assumption that other vessels they are meeting complying with such rules, or whether their masters must assume such other vessels are and will continue to be badly navigated, and act accordingly.

2. Under maritime conventions a number of the larger maritime nations of the world have adopted the rule assessing damages in marine collisions according to degree of fault. The United States is not a party to such conventions, but the result is in part attained by the gross fault rule. It is important to maritime interests of this country to know whether the gross fault rule will be liberally applied, as it was not in the case at bar.

3. As will be seen from Schedules C-1 to 11 (285) merchandise shipped on the Dixon alone moved under eleven tariffs having to do with shipments made under so-called insured bills of lading. The Dixon was but one of twenty-two vessels (276) operated by the Transit Corporation, all likewise insured. Van Ummersen Tariffs (Schedule C-9, Rec. 219) were filed in behalf of fourteen water transportation carriers operating on the Great Lakes. This does not include the Transit Corporation. Insurance on the Dixon's cargo was written by fourteen insurance companies, six

American and eight (including Lloyds), English (259). It was stipulated in effect that the legal determination with respect to the Atlantic Mutual's claim should stand as a determination with respect to each of the interested underwriters (260). It is of course of great importance not only to water carriers on the lakes, canals (Sched. C-3, Rec. 287) and on the ocean, who issue like tariffs, but also to the rail carriers (Sched. C-8, Central Freight Association, Rec. 290; Sched. C-10, Trunk Lines, Rec. 292), with whom the water carriers participate in through rates, as to whether policies in the form and having the coverage of the policies issued by the fourteen underwriters to the Transit Corporation did in fact insure such water carriers against the liability which they have assumed in waiving the saving provisions of the Harter Act. It is also of great importance to underwriters to know whether the policies they have been issuing do provide the indemnity which the water carriers desire.

We submit that the decision of the Circuit Court of Appeals is wrong and should be reviewed by this Court.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, demanding that Court to certify and to send to this Court for its review and determination on a day certain, to be therein named, the full and complete transcript of the record and of all proceedings in the cases numbered on its docket 6911, Admiralty, entitled Great Lakes Transit Corporation, Libellant, Respondent and Impleaded Respondent-Appellant, vs. Interstate Steamship Com-

pany, Libellant, Respondent-Appellee, John Milko, Intervening Libellant, Appellee, and Atlantic Mutual Insurance Company, *et al.*, intervening underwriters, and that said decree of the United States Circuit Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court as herein prayed for, and that your petitioner may have such other and further relief as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

GREAT LAKES TRANSIT CORPORATION,
By: LAURENCE E. COFFEY,
*Counsel for Petitioner.*

IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1936.

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GREAT LAKES TRANSIT CORPORATION,
*Petitioner,*

vs.

INTERSTATE STEAMSHIP COMPANY
and
ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*, Intervening Underwriters,
*Respondents.*

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# BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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The facts are stated in the petition. The suit is within the admiralty and maritime jurisdiction of the United States and of this Honorable Court. Jurisdiction of this Court is invoked under Title 28, Chapter 9, Sec. 347 of the United States Code, and under Article 3, Sec. 2 of the Constitution of the United States.

## Specifications of Error.

The Circuit Court of Appeals erred:

1. In concluding that the master of the Dixon was guilty of negligence for not being in doubt with respect to the navigation of the King at the time the latter blew her second one-blast signal.

2. In not holding that the Dixon, having complied with the rule of sight, was free from fault under the facts as found by the courts below.

3. In not applying the gross fault rule to the case at bar.

4. In not holding that the policies procured insured the Transit Corporation's liability to cargo owners and thus fulfilled its obligation under tariff provisions, and even if it did not fulfill such obligations such failure will not permit intervening underwriters to recover back any part of the moneys paid the Transit Corporation on account of its carriers liability which they had insured.

5. In not holding that the Transit Corporation, being actually and in terms the party insured by intervening underwriters policies, such underwriters can have no right of recovery against the Transit Corporation even if it be assumed that cargo owners were also entitled to the benefit of insurance.

## POINT I.

**The Circuit Court of Appeals erred in concluding that the Master of the DIXON was guilty of negligence for not being in doubt with respect to the navigation of the KING at the time the latter blew her second one-blast signal.**

This case is far and away beyond any adjudicated case in holding the Dixon in contributory fault. Research has disclosed no case in which a vessel has been condemned under Rule 26 unless (a) she has failed to answer a signal blown or failed to blow an alarm when she has received no response to her signal, (b) her

master has not been in fact in doubt as to the intentions of the other vessel, or (c) the passing proposed has been plainly impracticable.

In THE WILLIS L. KING, 285 Fed. 744, the court found that the master of the Superior City, had rung electric alarm bells warning the crew of danger so long before he blew his alarm that there was time for all of them to get on deck, and that this proved conclusively that for some time before he acted he *was in fact in doubt* as to the course and intention of the King.

In THE FOUNTAIN CITY, 62 Fed. 87, Judge Taft, writing for the Circuit Court of Appeals, says:

> "The lookout also says that the captain came running on to the deck.
>
> "It is very clear from this evidence that the failure of the Fountain City to reply to the third signal carried doubt as to her course to the minds of the mate, the captain and the lookout." (p. 92.)

In THE QUOQUE, 47 Fed. (2d) 873 (C. C. A. 2), twice cited in the opinion of the District Court (250, 252), the Quoque had improperly twice crossed the passing signals of the Tug Transfer No. 12. The Court held that by blowing an alarm the master of the Transfer showed that he realized there was danger, therefore he should have immediately stopped and backed.

If instead of blowing the second one-blast signal the King had blown a two-blast signal and at that time the Dixon had answered with an alarm but had not stopped, this case would have been identical with that

of the Quoque and the court could have justly concluded that Captain Goodberry was in fact in doubt as was conclusively shown by his alarm.

In THE GEORGE L. GARLICK, 91 Fed. 920, the court has the following to say with respect to the obligation of meeting vessels which have a passing agreement.

> "When one vessel has dictated the maneuver, and the other vessel has adopted and done her part to execute it, the facts should be clear, before the court should hold that the maneuver should have been interrupted, in the course of its fulfillment, because the vessel that initiated the movement failed to do her part. When a vessel is doing right, it is not always easy to determine nicely when the opposite vessel is doing wrong, and whether she will in time correct her error, and at just what time the unoffending vessel should undertake to counteract the wrong." (pp. 926, 927.)

## POINT II.

**The Circuit Court of Appeals erred in not holding that the DIXON, having complied with the "rule of sight", was free from fault under the facts found by the Courts below.**

Further authorities on the "rule of sight" are the following:

THE NACOOCHEE, 137 U. S. 330,
THE SADOCK, 9 Prob. Div. 116,
The COLORADA, 91 U. S. 692,
THE MARTELLO, 153 U. S. 64, 70.

Neither in the International Rules nor the Inland Rules of Navigation are passing signals permitted in a fog. (International Rules, Art. 28, 33 U. S. C. A. Sec.

113; Inland Rules Art. 18, Rule IX, 33 U. S. C. A., Sec. 203) while the Lake Rules require passing signals *in all weathers* (Rule 23, *supra*). For this reason the ocean and inland cases have little bearing upon the question presented.

Following is a tabulation of all lake fog collision cases reported which petitioner can find and the reasons for decision. It will be seen that after a proper passing arranged in no case was a vessel held in fault for failing to blow an alarm.

In THE NEGAUNEE, 20 Fed. 918, collision was held to be due to inevitable accident.

In THE ALBERTA, 23 Fed. 807, both vessels were held at fault for excessive speed. One was proceeding at ten miles an hour and the other at six.

In THE PESHTIGO, 25 Fed. 488, the condemning fault was the failure of a barge to sound her fog horn.

In THE OREGON, 27 Fed. 751, excessive speed was the condemning fault.

In BRADLEY v. THE JOHN PRIDGEON, JR., 38 Fed. 261, the Pridgeon was held solely at fault for having a careless and incompetent lookout.

In HOOD v. THE LEHIGH, 43 Fed. 597, both vessels were condemned, the steamer for excessive speed and the schooner for failure to show a torch.

In THE NORTH STAR, 62 Fed. 71 (CCA 6) the Sheffield was guilty for mistaking the signal of the

other vessel and the North Star for failing to stop and back after a cross signal.

In THE FOUNTAIN CITY, 62 Fed. 87 one vessel was held in fault for changing to a two-blast agreement after a one-blast agreement had already been made, and her master was in fact in doubt as to the position of the oncoming vessel. The other vessel was held in fault for not stopping and reversing when her signal was not answered.

In THE ARTHUR ORR, 69 Fed. 305, both vessels were held in fault for excessive speed.

In THE NORTHERN QUEEN, 117 Fed. 906 (C. C. A. 6) the Northern Queen was held solely at fault for excessive speed.

In ERIE & WESTERN TRANSIT CO. v. THE CITY OF CHICAGO, 178 Fed. 42 (CCA 7), the City of Chicago was held solely at fault for not giving warning by sound of the presence of a crib struck by a steamer.

In THE EMPIRE CITY, 222 Fed. 834, (CCA 6) the Empire City was at fault for being on the wrong side of the channel and having an inattentive lookout, and the Sonoma was at fault for proceeding after failing to secure an answer to her passing signal.

In THE W. H. GILBERT, 232 Fed. 547 (CCA 6) the Gilbert was held solely at fault for failing to hear the fog bell of an anchored vessel.

In THE J. J. HILL, 260 Fed. 655 (CCA 8) it was held that the Panther, which was the only vessel which

sustained damage failed to prove by preponderance of the evidence any fault of the other vessel contributing to the collision when it was shown that such other vessel had reduced to steerage way.

In THE MARTIN MULLEN, 260 Fed. 916 (CCA 6), both vessels were condemned for excessive speed.

## POINT III.

### The Circuit Court of Appeals erred in not applying the gross fault rule to the case at bar.

In THE UMBRIA, 166 U. S. 404, the gross fault rule was held applicable, although the Iberia changed her course and the Supreme Court indicated that under the navigation rules there effective, change of course was ordinarily not justified, which is the fact as shown by the following cases:

THE ALBERTA, 23 Fed. 807, 811.
THE ATLANTA, 26 Fed. 456, 461.
THE WYANOKE, 40 Fed. 702, 704.

In THE MUNRIO, 11 Fed. (2d) 900, the vessel changed her course without sanction of rule and did not stop and back until collision was unavoidable. Nevertheless the court applied the gross fault rule, stating:

> "No contention is made that the Munrio committed any act specifically prohibited by the International Rules, or that she failed to do any act made mandatory by them. On the other hand, full speed in a fog, in known proximity to another vessel, is so gross a fault that the Munrio's negligence must be made very clear before she will be condemned. The Umbria, *supra*." 903.

In the case at bar as in the above case, there is no finding that the Dixon committed any act specifically prohibited by the rules or that she failed to do any act made mandatory by them, her sole fault being that her master was not in doubt at a time when the Court was of the opinion that he should have b[illegible]n.

As stated in THE STIMSON, 257 Fed. 762, authorities to sustain the gross fault rule might be cited almost without number.

## POINT IV.

**The Court erred in not holding that the policies procured insured the transit corporation's liability to cargo owners and thus fulfilled its obligation under tariff provisions, and even if it did not fulfill such obligations such failure will not permit intervening underwriters to recover back any part of the moneys paid the Transit Corporation on account of its carriers liability which they had insured.**

Both courts below held that the various tariff provisions obligated the Transit Corporation to procure policies of cargo insurance. The cases hold otherwise.

In WYMAN, PARTRIDGE, *et al.* vs. BOSTON & MAINE RR. *et al.*, speaking of like tariff provisions, the Interstate Commerce Commission in 13 I. C. C. of Rep. 258, says:

> "In such event the carrier itself would become the insurer and the shipper would require no additional insurance. It would be entirely imma-

terial to the shipper if the carrier did or did not protect itself by insurance against possible loss."

In HILL vs. SCOTT, (1895) 2 Q. B. 371 (affirmed by the Court of Appeals on the opinion below L. R. (1895) 2 Q. B. 713) the carrier charged a through rate covering all expenses, including insurance. It was held that notwithstanding a prior course of dealing in which the carrier awaited collection from underwriters before remitting to cargo underwriters, the carrier was liable. The Court states, page 378:

"The insurance was effected by the defendant for his own protection"

and

"There was nothing remarkable in the shipowner insuring himself, especially where there was no bill of lading exception."

In SOUTHERN COTTON OIL CO vs. MERCHANTS & MINERS TRANSP. CO., 179 Fed. 133, the bill of lading provided that the freight was covered by marine insurance in accordance with and subject to the conditions and limitations of policies of marine insurance held by the carrier. After holding that the policies were not direct insurance on the goods but only reinsurance, Judge Learned Hand held the obligation of the carrier under the bill of lading provision was

"to pay the shipper's loss under the same contingencies as permitted him through his own reinsurance to throw the loss upon his own insurers. This I do not think was *ultra vires* a carrying corporation and did not constitute doing an independent insurance business."

In GROSS vs. NEW YORK & TEXAS SS. CO., 107 Fed. 516, the carrier agreed to "cover the shipowner with marine insurance from Galveston northward". Both the shipper and carrier had insurance. It was concluded that the effect of the clause was to make the carrier liable, and therefore *his* underwriters liable.

Even though the carrier's liability policy procured did not satisfy the tariff obligation, since cargo owners have been paid in full they are in no wise concerned. Such failure surely would not permit intervening underwriters to recover back the moneys they had paid to reimburse the Transit Corporation for its liability as a *common carrier*, insurer or *otherwise* which it had assumed and underwriters had insured. The reasoning of the Circuit Court of Appeals seems to be to construe tariff provisions obligating the Transit Corporation to obtain marine insurance as not permitting it to procure any other than cargo insurance, and ignores the provision of the policy covering carriers liability.

## POINT V.

**The Circuit Court of Appeals erred in not holding that the Transit Corporation, being actually and in terms the party insured by intervening underwriters policies, such underwriters can have no right of recovery against the Transit Corporation even if it be assumed that cargo owners were also entitled to the benefit of insurance.**

As stated above, the policy covered the assured's liability to others, being of course the liability which the Transit Corporation had assumed by reason of its

waiver of the Harter Act and of all other defenses. That the insured meant "Transit Corporation" wherever used, and not cargo owners, conclusively appears when attempt is made to substitute "cargo owner" for "Transit Corporation" in any clause in the policy. Thus

> "Upon any charges of the Assured upon any and all cargo • • • from the time the Assured becomes responsible for such cargo" (275).
>
> "The Assured will not assume responsibilty for marine perils in connection with such (iron ore and grain in bulk) shipments • • •" (278).
>
> "The Assured will report to these underwriters the total number of tons • • • carried by them."
>
> "The Assured shall report • • • the amount of grain held in their vessels for winter storage" (279).

The Circuit Court of Appeals has held that the insurance was *cargo* insurance payable to the owners of the Dixon not as carrier but as bailee or trustee of the cargo for the owners (355). The error in such holding is illustrated by substituting in the following clause for the "assured", the party for whom the court holds the Transit Corporation was acting as Trustee:

> "The cargo owners taking upon themselves as to said cargo or parts thereof, the insurance of said cargo against perils of the seas and lakes and the said assurers agree and undertake to indemnify said cargo owners to the extent to which the cargo owners may be held liable by the cargo owners under any liability which the cargo owners shall have assumed as common carriers, insurers or otherwise."

*Even if it be assumed that these policies were for the benefit of cargo owners and directly enforcible by them,*

*as persons in some manner covered by the phrase "for account of whom it may concern", intervening underwriters would have no right to subrogation against their named assured, the Transit Corporation.*

The case would then come squarely within the doctrine of WAGER v. PROVIDENCE INS. CO., 150 U. S. 99. There, open policies had been issued to Morse & Co. *"for account of whom it may concern"*. Morse & Co. had assumed the obligations of a carrier. Certificates of insurance under these open policies were issued to the cargo owner, and after a loss had occurred for which the carrier was liable, the insurance company paid the amount of the policy to the cargo owner. The insurance company then brought suit against Morse & Co. and against Wager, master of the vessel, to recover the amount so paid. The Supreme Court held:

> "It would seem to be clear that where the carrier is actually and in terms the party insured, the underwriter can have no right to recover over against the carrier, even if the amount of the policy has been paid by the insurance company to the owner on the order of the carrier • • •. H. Morse & Co. were, nominally at least, the parties insured and came within the terms of the policy, and upon a loss, were entitled to receive the amount of the policy, and of course, in that event, the insurers could not, after having paid H. Morse & Co. the amount of the loss, recover it back from them under the principle of equitable subrogation."

The Court then found that no different conclusion should be reached because of the fact that the insurance companies paid the amount of the loss directly to the cargo owners. In the *Wager* case, the bills of lading did not contain any provision giving the carrier

the benefit of the shipper's insurance (the first headnote to that case being misleading) and in every respect to decision is in point on the issues here involved.

To the same effect as the Wager case are:

THE JOHN RUSSELL, 68 Fed. (2d) 901;

SORENSON vs. BOSTON INS. CO., 20 Fed. (2d) 640;

GROSS vs. NEW YORK & TEXAS SS. CO., *supra* (page 521 of 107 Fed.)

and see discussion in

PHOENIX INS. CO. vs. ERIE & WESTERN TRANSP. CO., 117 U. S. 312, at pp. 320-325.

In the case of LOWERY v. CONNECTICUT FIRE INS. CO., 70 Fed. (2d) 324, cited by Judge West in his supplemental opinion, the question was as to whether a vessel owner not named in a liability policy was entitled to the benefit of insurance issued in the name of the charterer, who was the carrier of the cargo. The obligation of the underwriters to indemnify the carrier, named as the assured in their policies, was admitted.

## In Conclusion on the Insurance Question.

Underwriters intervened in the consolidated suits to present one question and one question only—their right to a decree against the King for full cargo damages. They realized that by policy provisions they were obligated to indemnify the Transit Corporation for its carriers liability to cargo owners, and they made their payments to the Transit Corporation individually, not as trustee or bailee for cargo, to satisfy such obliga-

tion. Their petition neither in stating part or prayer for relief alleges that they are entitled to recover back anything from the Transit Corporation. THE ALABAMA AND THE GAMECOCK, 92 U. S. 695; THE VIRGINIA EHRMAN, 97 U. S. 309; CITY OF HARTFORD, 97 U. S. 323, and other like cases it was decided that each vessel in fault was liable for a moiety of the cargo damage. With this decision the claim of intervening underwriters, departed from this case since no one denies that subrogated to the rights of the Transit Corporation it would be entitled to recover the moiety of cargo damage payable by the King and no more.

Both courts below concluded that "marine insurance" required by tariffs could mean but one thing only, to wit, direct insurance on the cargo. Although petitioner submits this was erroneous, it is immaterial. There was nothing to prevent the Transit Corporation from purchasing a double coverage—cargo insurance and carriers liability. If, as held by the Court of Appeals, the policies were in fact cargo policies, this does not preclude them from being also carriers liability policies, nor does it permit the court to elide the carriers liability clauses. If although contrary to the doctrine of the Wager case, the court decides that as a cargo policy underwriters are subrogated to the rights of the cargo owners and can recover from their named assured a moiety of cargo damage, surely this does not preclude the court from holding that as a carriers liability policy they must reimburse the assured for the liability it assumed as a common carrier, nor does it permit the court to direct that *without demand therefor* underwriters shall recover back from the Transit Corporation a moiety of the amount which underwriters had paid to satisfy their carriers liability coverage.

Upon any proper construction of the policies in connection with the facts as stipulated, there is no justification for the decree directing that a moiety of the cargo damage shall be paid back by the Transit Corporation to the underwriters who have never requested such payment back.

THE DECREE OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED.

BROWN, ELY & RICHARDS,
*Proctors for Great Lakes Transit Corporation, Petitioner.*

LAURENCE E. COFFEY,
*Of Counsel.*